Malayan Banking Bhd (substituting PhileoAllied Bank (M) Bhd by order of court of 30 July 2001) v BSN Commercial Bank (M) Bhd (substituting BSN Commercial Bank (M) Bhd by order of court 28 November 2001)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D3–24–25 OF 2000
VARGHESE GEORGE JC
22 JUNE 2010

Civil Procedure — Judgment — Monetary judgment — Enforcement — Shares not delivered within period ordered — Legal interest in shares passed hands — Whether plaintiff entitled to demand proceeds of sale — Whether defendant could challenge value of shares — Whether any undue delay by plaintiff — Whether application time barred

Civil Procedure — Functus officio — Order of court — Whether order final or conclusive — Whether plaintiff sought to vary or modify order — Whether court functus officio

The original protagonists in this suit were Phileo Allied Bank ('the plaintiff'), with BSN Commercial Bank (M) Bhd as the defendant. The current parties in the proceedings were the successors-in-title to the respective parties. One, Wembly Industries Holdings Bhd ('WIHB') who owned eight million shares in Kuo Shinn Bricks Industries Sdn Bhd ('Kuo Shinn shares') had pledged the above shares to both the plaintiff and to the defendant as security for facilities granted. The plaintiff appointed receivers and managers over assets of WIHB and a dispute arose between the parties as to who had priority over the Kuo Shinn shares. The said receivers and managers did, in December 1998, give written notice to the defendant of the plaintiff's claim of a prior charge over the Kuo Shin Shares. On 25 November 2002, this court ruled in favour of the plaintiff and declared that the plaintiff had a first fixed charge over the Kuo Shinn shares and further that this charge had priority over any charge and/or interest which the defendant had in or over the same Kuo Shinn shares. The defendant's appeal against the said order to the Court of Appeal was dismissed with costs. The defendant's application for leave to appeal against that decision to the Federal Court was disallowed. The plaintiff then filed the present application ('encl 25') for a monetary judgment in the sum of RM30m, interest and cost to be recorded against the defendant. The court had to consider, inter alia, the issue of the value of shares and whether the defendant was estopped

from challenging the sum of RM30m as constituting the 'proceeds' from the sale of the Kuo Shinn shares.

Held, allowing the plaintiff's application with costs:

(1) The plaintiff, vide encl 25, sought to give the order of court dated 25 November 2002 'completeness' for the purposes of execution. Further, encl 25 was also not an application for any additional relief of a fresh and substantial nature. The wording of the caption of encl 25 was also not misleading in any way. The originating summons process had not been fully spent or exhausted and/or a conclusive or enforceable decision issued therein as yet. There was therefore no circumvention of any procedural requirements or violation of any substantive law by the plaintiff by filing the current application for a monetary judgment to be recorded against the defendant (see paras 24 & 29).

(2) Further, encl 25 was not time barred as it was brought well within the 12 years. Further, no 'arrears' of interest sought to be recovered by the plaintiff. 'Arrears' of interest have not arisen at the time of the determination of encl 25. A 'judgment debt' had not been adjudged as yet. The rate of interest payable and the period for which such interest is payable had to be first determined by the court. Only upon default of the payment of such interest sum would there even arise any quantified 'arrears' of interest. There will be still six years thereafter for the judgment creditor to act to recover the same (see paras 32–33).

(3) The principles of estoppel applied and came to the assistance of the plaintiff in this fact scenario. The court held that the defendant could not exculpate themselves from their representation that the shares had indeed been sold and the proceeds of sale received by the defendant in respect of the Kuo Shinn shares. *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad [1995] 3 MLJ 331* followed (see para 50).

(4) The plaintiff was led to believe or to rely on the representations of the defendant that the Kuo Shinn shares had been sold and the proceeds of the sale obtained by the defendant amounted to RM30m. The plaintiff was entitled to receive the RM30m but had withheld any action to recover or enforce the same on the request of the defendant that such be delayed or stayed until after the defendant's appeal to the Court of Appeal was heard and disposed. The defendant was a commercial bank of some standing and it was not unreasonable at all for the plaintiff to grant this accommodation based on the assurance that the sum of RM30m was always there in cash terms when the appeal process was completed and should the judgment in favour of the plaintiff be affirmed. There was therefore no longer any issue of the defendant delivering up the eight million shares to the plaintiff, the time for which had expired on 2 December 2002. The plaintiff was justified in law and on the evidence to

reject the defendant's attempt to do so only after a demand for the RM30m was made on behalf of the plaintiff (see para 58).

[Bahasa Malaysia summary

Protagonis-protagonis asal di dalam tindakan ini adalah Phileo Allied Bank ('plaintif'), dengan BSN Commercial Bank (M) Bhd. Pihak-pihak sebagai defendan dalam prosiding ini adalah pengganti berhak kepada pihak-pihak masing-masing. Wembly Industries Holdings Bhd ('WIHB') yang memiliki lapan juta saham di dalam Kuo Shinn Bricks Industries Sdn Bhd ('saham Kuo Shinn') telah memberi jaminan saham tersebut kepada plaintif dan kepada defendan sebagai sekuriti untuk kemudahan-kemudahan yang diberikan. Plaintif melantik penerima dan pengurus ke atas aset WIHB dan pertikaian berbangkit di antara pihak-pihak mengenai siapa yang mempunyai keutamaan terhadap saham Kuo Shinn. Penerima dan pengurus telah pada Disember 1998, memberi notis kepada defendan mengenai tuntutan plaintif terhadap caj sebelumnya ke atas saham Kuo Shin. Pada 25 November 2002, mahkamah ini memerintahkan memihak plaintif dan mengisytiharkan bahawa plaintif mempunyai caj tetap pertama ke atas saham Kuo Shinn dan selanjutnya caj ini mempunyai keutamaan ke atas mana-mana caj dan/atau faedah yang mana defendan miliki di dalam atau ke atas saham-saham Kuo Shinn yang sama. Rayuan defendan terhadap perintah tersebut kepada Mahkamah Rayuan ditolak dengan kos. Permohonan defendan untuk izin merayu terhadap keputusan Mahkamah Persekutuan dibenarkan. Plaintif kemudiannya memfailkan permohonan ini ('lampiran 25') untuk penghakiman wang di dalam jumlah RM30 juta, faedah dan kos ditetapkan terhadap defendan. Mahkamah terpaksa mempertimbangkan, antara lain, isu nilai saham dan sama ada defendan diestop daripada mencabar jumlah RM30 juta tersebut sebagai wang yang diperoleh daripada jualan saham-saham Kuo Shinn.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Plaintif, melalui lampiran 25, memohon untuk memberi perintah mahkamah bertarikh 25 November 2002 'completeness' untuk tujuan pelaksanaan. Selanjutnya, lampiran 25 juga bukan permohonan untuk apa-apa relief tambahan bersifat baru dan substansial. Perkataan kapsyen lampiran 25 juga tidak mengelirukan dalam apa-apa cara. Proses saman pemula tidak digunakan sepenuhnya atau dihabiskan dan/atau suatu keputusan konklusif atau dikuatkuasakan yang dikeluarkan lagi. Oleh itu tidak terdapat pemintasan apa-apa prosedur keperluan atau pencabulan apa-apa undang-undang substantif oleh plaintif dengan memfailkan permohonan ini untuk penghakiman wang untuk direkodkan terhadap defendan (lihat perenggan 24 & 29).

(2) Selanjutnya, lampiran 25 tidak dihalang masa kerana ia difailkan betul dalam masa 12 tahun. Selanjutnya, 'tunggakan' faedah tidak dipohon untuk didapatkan kembali oleh plaintif. 'Tunggakan' faedah tidak

berbangkit pada masa penentuan lampiran 25. Satu 'hutang penghakiman' tidak dihakimkan lagi. Kadar faedah berbayar dan tempoh untuk di mana faedah sedemikian adalah berbayar mestilah ditentukan terlebih dahulu oleh mahkamah. Hanya selepas keingkaran pembayaran jumlah faedah sedemikian barulah berbangkit apa-apa jumlah tunggakan faedah. Masih terdapat tahun kemudiannya untuk pemiutang penghakiman bertindak mendapatkannya kembali (lihat perenggan 32–33).

(3) Prinsip-prinsip estopel terpakai dan membantu plaintif dalam fakta senario ini. Mahkamah memutuskan bahawa defendan tidak boleh membebaskan diri mereka daripada daripada representasi mereka bahawa saham-saham sememangnya telah dijual dan keuntungan jualan yang diterima oleh defendan berkaitan saham-saham Kuo Shinn (lihat perenggan 50). *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad [1995] 3 MLJ 331* diikut.

(4) Plaintif dipengaruhi untuk mempercayai atau bergantung pada representasi defendan bahawa saham-saham Kuo Shinn telah dijual dan keuntungan jualan tersebut diperolehi oleh defendan berjumlah RM30 juta. Plaintif berhak untuk menerima RM30 juta tetapi menahan apa-apa tindakan untuk mendapatkan kembali atau menguatkuasakannya atas permintaan defendan bahawa kelewatan sedemikian atau penangguhan selepas rayuan defendan ke Mahkamah Rayuan didengar dan diputuskan. Defendan adalah bank perdagangan yang ternama dan ia adalah tidak munasabah sama sekali untuk plaintif memberikan tolak ansur ini berdasarkan jaminan bahawa jumlah RM30 juta sentiasa ada dalam terma tunai apabila proses rayuan selesai dan sekiranya penghakiman memihak plaintif disahkan. Oleh itu tidak terdapat lagi apa-apa isu mengenai defendan menyerah saham-saham lapan juta tersebut kepada plaintif, yang mana masa untuk menyerahkan telah tamat pada 2 Disember 2002. Plaintif berjustifikasi dalam undang-undang dan atas keterangan untuk menolak percubaan defendan untuk berbuat demikian hanya selepas tuntutan untuk RM30 juta tersebut dibuat bagi pihak plaintif (lihat perenggan 58).]

Notes

For cases on judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4169–4446.

For cases on functus officio generally, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3082–3105.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (folld)

Penrice v Williams (1883) 23 Ch D 353 (refd)

Public Bank Bhd v Chan Tak Kow [1988] 3 MLJ 330, HC (refd)
Tong Lee Hwa & Anor v Chin Ah Kwi Tong Chong Fah v Chin Ah Kwi [1971] 2 MLJ 75, HC (refd)

Legislation referred to

Limitation Act 1953 ss 2, 6(3)

Wong Chee Lyne (Skrine & Co) for the plaintiff.
Ramesh Kanapathy (Chellam Wong & Co) for the respondent.

Varghese George JC:

[1] On 31 May 2010 I delivered the decision of the court on the plaintiff's application vide encl 25 (*saman dalam kamar*) for a 'monetary judgment' to be entered against the defendant pursuant to the terms of an earlier order of court in the same action, namely the order made on 25 November 2002 by Zulkefli Ahmad Makinuddin J (as His Lordship then was). The defendant vigorously contested the application and their objection may be conveniently categorised under three broad heads, namely:

(a) that it was procedurally flawed and unsustainable;

(b) that limitation had set in and such an application was time-barred, and

(c) the plaintiff could not rely on the principle of estoppel to fix the value of the eight million shares that had been 'sold' to be RM30m and, if at all, any further order was to be made by this court, it should only be an order to assess damages payable by the defendant.

[2] After having given due consideration to the evidence before me by way of affidavits and submissions of counsel for both parties and having also carefully examined the terms of the order of court of 25 November 2002, I delivered the following decision:

(a) The defendant was to pay the plaintiff the admitted sum of RM30m being the proceeds derived from the sale of the eight million ordinary shares in Kuo Shinn Bricks Industries Sdn Bhd, to be paid within 14 days of the 31 May 2010 together with interest thereon at the rate of 8%pa from 2 December 2002 (being the expiry of the seven day period for delivery up of the shares as ordered by court on 25 November 2002) until full settlement.

(b) The defendant was to pay the plaintiff cost of this application in the sum of RM1,000 (being an in chambers application).

[3] I then read out the broad grounds for my decision and reserved the right to elaborate on the same in greater detail in the event full grounds of decision were required to be issued by me in this matter at a later stage.

[4] I now set out the full grounds for my decision.

BACKGROUND

[5] The original protagonists in this suit were Phileo Allied Bank ('Phileo') who was the plaintiff, with BSN Commercial Bank (M) Bhd ('BSN') as the defendant. The current parties in the proceedings are the successors in title to the respective parties. One, Wembly Industries Holdings Bhd ('WIHB') who owned eight million shares in Kuo Shinn Bricks Industries Sdn Bhd ('Kuo Shinn shares') had pledged these Kuo Shinn shares to both Phileo and to BSN as security for facilities granted.

[6] Phileo appointed receivers and managers over assets of WIHB and a dispute arose between the parties as to who had priority over the Kuo Shinn shares. The said receivers and manager did in December 1998 give written notice to BSN of Phileo's claim of a prior charge over the Kuo Shin Shares. During the course of 1999 various correspondences between the parties and/or their solicitors ensued wherein each held to their claim of a better right than the other to the Kuo Shinn shares.

[7] The *saman pemula* (originating summons) in this action was filed by the plaintiff on 28 January 2000. This court on 25 November 2002 ruled in favour of the plaintiff and declared (amongst other declarations and orders) that the plaintiff had a first fixed charge over the Kuo Shinn shares and further that this charge had priority over any charge and/or interest which the defendant had in or over the same Kuo Shinn shares. (The relevant parts of the order of 25 November 2002 is reproduced and discussed in detail below in this judgment.)

[8] The defendant appealed against the said order of court and the Court of Appeal dismissed the same with costs on 27 November 2008. The defendant's application for leave to appeal against that decision to the Federal Court was disallowed on 8 July 2009.

[9] The plaintiff then filed the present *saman dalam kamar* — encl 25 — application on 20 August 2009 for a monetary judgment in the sum of RM30m, interest and cost to be recorded against the defendant.

[10] In my view it would be convenient to deal with the merits of the plaintiff's application as well as the objections of the defendant to the same

under the three broad heads of the defendant's objections identified by me above.

PROCEDURAL OBJECTION

[11] The defendant contends that this court is functus officio after the court had delivered the order of 25 November 2002 and accordingly lacked any jurisdiction to hear encl 25.

[12] Upon a closer and careful reading of the order of 25 November 2002, I am not persuaded that it was a 'final' or 'conclusive' order as argued by the defendant. The very terms of the order of 25 November 2002 do, to the contrary, contemplate and envisage further applications within this proceeding or action. Hence, I hold that this court has not been deprived after the delivery of the order of 25 November 2002 of further jurisdiction to entertain any application in the matter arising from or related to that order of 25 November 2002.

[13] The material part of the order of court of 25 November 2002 (encl 20) in its English translation is reproduced here:

> … IT IS HEREBY DECLARED that the plaintiff has a first fixed charge over the 8 million ordinary shares of RM1.00 each in Kuo Shinn Bricks Industries Sdn Bhd (the Kuo Shinn shares) purportedly charged and/or pledged by Wembley Industries Holdings Bhd (WIHB) in favour of the defendant pursuant to 2 Memoranda of Deposit dated 04/08/1995 and 01/11/1995 respectively AND IT IS ALSO DECLARED that the plaintiff's charge and/or interest in and over the Kuo Shinn shares has priority over any charge and/or interest which the defendant has in or over the Kuo Shinn shares AND IT IS ORDERED that the defendant do deliver up to the plaintiff the Shares Certificates in relation to the Kuo Shinn shares, together with the relevant transfer forms duly executed by the defendant and/or its nominee, within seven days of the date of this order AND IT IS FURTHER ORDERED that the defendant do pay to the plaintiff damages to be assessed AND IT IS FURTHER ORDERED that in the event the Kuo Shinn shares or any part thereof had been sold or otherwise disposed of by the defendant, the defendant do account to the plaintiff for the proceeds of sale or proceeds thereof obtained by the defendant and do pay over to the plaintiff the said proceeds of sale or proceeds thereof AND IT IS FURTHER ORDERED that the defendant do pay interest on the sums payable to the plaintiff at such rates and for such periods of time as this Honourable Court deems just and proper AND IT IS LASTLY ORDERED that the defendant do pay the costs of this action.

[14] It is clearly discernible from the terms of the order of court of 25 November 2002 that the court after granting the declarations in favour of the

plaintiff, had ordered the defendant to *either*:

(a) deliver up to the plaintiff the share certificates in relation to the Kuo Shinn shares, together with the relevant transfer forms duly executed by the defendant and/or its nominee, within seven days of the date of the order *and* the defendant was also to pay the plaintiff damages to be assessed, *or*

(b) in the event the Kuo Shinn shares or any part thereof had been sold or otherwise disposed of by the defendant, then the defendant was to account to the plaintiff for the proceeds and do pay over to the plaintiff the said proceeds of sale or proceeds thereof *and* the defendant was to pay interest on the sums payable to the plaintiff at such rates and for such periods of time as the court deems just and proper.

[15] Two alternative situations or eventualities were therefore clearly contemplated within the order following upon the declarations made in favour of the plaintiff by the court on 25 November 2002.

[16] The order of 25 November 2002 left open matters to be further determined by the court. For example, the order for 'assessment for damages' which, as I read the terms of the order, would only come into play *if* the Kuo Shinn shares were indeed delivered up within seven days as ordered therein. In this first scenario, should there have arisen any shortfall of value when the shares were delivered up, it was envisaged that the plaintiff would have to be necessarily compensated by payment of damages which was then to be assessed.

[17] Another matter left open was the 'rate' and the period for which interest was to be paid which, as I read the terms of the order, was intended to follow if proceeds of sale of the shares as ordered was accounted for by the defendant. In that latter event, the issues as to the rate and the period for which interest was payable by the defendant was still to be dealt with and determined by the court at a later date.

[18] In both instances, it was expected that the parties were to establish upon further evidence in court either damages *or* the reasonable rate and the period for which interest was payable to the plaintiff, as the case maybe.

[19] A subsequent determination of the quantum of 'monies' payable by the defendant to the plaintiff or recoverable by the plaintiff under or pursuant to the terms of the principal findings in the order of court of 25 November 2002 was therefore, in my considered finding, clearly within the contemplation of the court, and I would say within the expectation of the parties, when the order of the 25 November 2002 was issued. This court was therefore not functus

officio and could still entertain applications to give completeness to the decision delivered on 25 November 2002. A

[20] I find that there is also merit in the plaintiff's further argument that to enable the order of court of 25 November 2002 to be an effective and enforceable judgment, a 'monetary judgment' or order in term of 'monies to be paid' by the defendant was still necessary. Not only was this envisaged as aforesaid within the wording of the order itself but this was an additional reason why the plaintiff should not be shut out in bringing an application in the nature of that found now in encl 25. B C

[21] In any event it was also the plaintiff's contention that the law did allow to be implied into an order of court, such as the order of court of the 25 November 2002, a further order granting *'liberty to apply'* to any of the parties in respect of the areas left for future determination, *notwithstanding* that such enabling words of 'liberty to apply' (or to similar effect), were not expressly spelt out in the order itself. I accept, on the decided authorities cited to me by the plaintiff in support of this proposition, that 'liberty to apply' could be implied or imputed into a decision or order in the context of the particular wording of a court order. Nothing in the order of 25 November 2002 restricted such 'liberty to apply' being deemed as a further or implied term of the order itself. D E

[22] The Federal Court in *Tong Lee Hwa & Anor v Chin Ah Kwi Tong Chong Fah v Chin Ah Kwi* [1971] 2 MLJ 75 (a case where there was a 'liberty to apply' provision in a consent order for settlement) observed that the words 'liberty to apply' in an order prima facie mean that when the order was drawn up, its working out might involve matters on which it might be necessary to obtain a decision of the court; they do not however confer any right to ask the court to vary the order. In *Public Bank Bhd v Chan Tak Kow* [1988] 3 MLJ 330, also a case where the order in question contained a 'liberty to apply' clause, it was noted that prima facie the words 'liberty to apply' refer to the working out of the actual terms of the order and it '… should be confined to the problem relating to enforcing or executing the order such as, for example, if there is some difficulty in its enforcement because of the terms of the order later found to be unclear or doubtful when faced with the actual situation on the ground, the party which obtained the order may approach the court again for its indulgence to seek clarification'. F G H I

[23] Can then an order of court be deemed to carry with it — liberty to apply to the court — though it is not so expressly reserved? The court of equity in the words of Chitty J in *Penrice v Williams* (1883) 23 Ch D 353, had this to say:

A It is said, however, that this order cannot be said to be final, because — to use the words of Mr Justice Fry, in *Fritz v Hobson* confirming a statement of the late Master of Rolls — all orders of the court carry with them in gremio liberty to apply to the court, and such liberty should therefore be implied as existing in this order. With reference to what was said in that case with regard to liberty to apply, you must B consider whether or not the order is one which can or cannot be worked out without any further order. *There may be cases where liberty to apply would be granted, although the words had been omitted from a judgment order, when the order is clearly not of a final character, and also when there is necessarily something to be done irrespective of what appears on the face of the order.*

C

[24] What was being sought by the plaintiff vide encl 25 was not to vary or modify the order of court of 25 November 2002, but to give it 'completeness' for purposes of execution to be pursued with by the plaintiff on the very judgment obtained.

D

[25] The defendant's alternative ground of objection on this score was that, even if this court retained jurisdiction to still entertain any further application after 25 November 2002, then such an application or any order to be made should be restricted to the issuing of an order for assessment of damages only. E I find no merits in this argument. After examining the prayers in the *saman pemula* (encl 1) and the terms of the order of 25 November 2002 (encl 20) I find that the 'assessment of damages' was meant to follow the delivery up within seven days by the defendant of the eight million Kuo Shinn shares, that is if the defendant complied with the first part of the alternative scenarios F addressed in the order of 25 November 2002. This did not however happen in the instant case.

[26] More importantly, once the defendant had themselves admitted or led G the plaintiff to believe as a matter of fact as to what was the amount which constituted the 'proceeds of the sales of shares' (as will be further discussed below), no issue of ordering any 'assessment of damages' arises, that is, in the particular fact circumstances of this case.

H **[27]** This court is entitled to give a reasonable and fair interpretation to the terms of the order of 25 November 2002. I therefore hold that the plaintiff is not precluded from bringing the encl 25 application within this action.

[28] Was there any delay on the part of the plaintiff in bringing this I application as contended for by the defendant? There was definitely no delay by the plaintiff in bringing this application. It is beyond dispute, that after the order of court was made on 25 November 2002 (a judgment on liability as I would construe it) it was the defendant who took it on appeal to the Court of Appeal. This appeal was dismissed only on 27 November 2008. The

defendant's intention to further appeal to the Federal Court came to an end on 8 July 2009 when leave to do so was refused by our apex court.

[29] Enclosure 25 (SDK) was filed by the plaintiff on 20 August 2009, that is rather immediately thereafter and in any case, in my assessment, within reasonable time (within one and half months). Enclosure 25 is also not an application for any additional relief of a fresh and substantial nature as argued by defendant's counsel. The wording of the caption of the SDK as — 'plaintiff's application for enforcement of order dated 25 November 2002' is also not misleading in any way. The originating summons process, for the reasons I have stated earlier above, had not been fully spent or exhausted and/or a conclusive or enforceable decision issued therein as yet. There is therefore in my assessment no circumvention of any procedural requirements or violation of any substantive law by the plaintiff by now filing this application for a monetary judgment to be recorded against the defendant.

LIMITATION

[30] At the hearing of the SDK — encl 25 on 14 May 2010, the defendant's counsel raised the issue of limitation specifically relying on s 6(3) of the Limitation Act 1953, read together with s 2, the definition section of the Act. I hold that the SDK— encl 25 filed by the plaintiff and now before this court is not time barred as argued by the defendant's counsel.

Section 6(3) reads:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[31] In s 2, 'action' is defined as 'includes a suit or any other proceeding in a court of law;'

[32] Even if encl 25 is an 'action' or 'proceeding' upon a judgment there is no disputing the fact that encl 25 is brought however well within the 12 years set there as the time allowed for such proceeding to be initiated.

[33] Further, no 'arrears' of interest is being sought to be recovered here by the plaintiff. 'Arrears' of interest so to speak, have not arisen as at present, that is, at the time of the determination of SDK — encl 25. A 'judgment debt' had not been adjudged as yet. The rate of interest payable and the period for which such interest is payable had to be first determined by the court. Only upon default of the payment of such interest sum (that is, after it is determined in the first place) would there even arise any quantified 'arrears' of interest. There will

be still six years thereafter for the judgment creditor to act to recover the same.[50]

FACTS AND THE ESTOPPEL ISSUE

[34] I now address the issue of the value of shares and why the defendant is estopped from challenging the sum of RM30m as constituting the 'proceeds' from the sale of the Kuo Shinn shares. For convenience I treat the evidence before the court in two time frames, namely:

(a) material events or developments pre-court order of 25 November 2002, and

(b) material events or developments post-court order of 25 November 2002.

Pre 25 November 2002 events

[35] As early as December 1998, the plaintiff, through the receivers and manager appointed by them, had given the defendant notice, that the plaintiff had a prior right as secured creditors under a charge to them of the eight millions Kuo Shinn shares. The plaintiff also then put the defendant on notice that if the Kuo Shinn shares had been sold, the proceeds received is to be held in trust by the defendant for the plaintiff.

[36] In the course of various exchange of letters between the parties or their respective solicitors pertaining to this issue, we have of material significance the contents of a letter of *11 June 1999* from the defendant's then solicitors, Messrs Gill & Tang, which, inter alia, categorically held out as follows:

> … *our client has proceeded to sell and dispose of* the said shares and our clients do not need nor require your clients' consent to realize their pledge.

[37] The plaintiff nevertheless proceeded to file the *saman pemula* (originating summons) in this proceeding on 28 January 2000. The relief sought by the plaintiff included a prayer for the delivery up of the shares notwithstanding that earlier representation by letter of 11 June 1999 that the shares had by then been sold. I find nothing wrong in the plaintiff still maintaining in the originating summons a claim or prayer for the delivery up of the shares despite the disclosed fact that the Kuo Shinn shares had by then been sold by the defendant. In true tradition of good pleadings, the prayers were drawn up as it would appear to me, to cover all probable scenarios. One should not, I believe, rule out at that time the possibility of the defendant even arranging to secure or buy back and deliver up the Kuo Shinn shares to the

plaintiff as claimed for (and pay damages, if any suffered to be assessed, as I observed earlier). That was the first or principal redress sought of the defendant in any event.

[38] Further it has nowhere been shown to me that the defendant had at any point or stage in the *saman pemula* proceedings that is before the order of court of 25 January 2002 was made, ever denied that the Kuo Shinn shares had indeed been sold by the defendant. The defendant was consistent in their story and had all along held out that the Kuo Shinn shares had been sold or disposed as a matter of fact.

Post 25 November 2002 events

[39] There is also no dispute at all that the defendant did not comply with the seven day deadline imposed on the defendant under the terms of the order of 25 November 2002 to deliver up the Kuo Shinn shares to the plaintiff. The time period fixed for this handing over of the shares expired on 2 December 2002 without the shares being delivered up by the plaintiff.

[40] It is also beyond dispute that the defendant did not tender or effect payment of any 'proceeds of sale' received by the defendant from the sale or disposal of the Kuo Shinn shares immediately following the order of court of 25 November 2002. On *12 December 2002* in a letter from Messrs Gill & Tang, the defendant's solicitors, we then have another material statement on behalf of their client (the defendant). It was:

> Enclosed please find the order duly amended and approved. As the shares in Kuo Shing Brick Industries Sdn Bhd which were pledged to our clients *were sold off for RM 30,000,000* the *proceeds of sale* were used to pay off in part the amount owed to our clients, whereas the total amount outstanding to our clients on 31.12.98 was RM 42,576,709.50 which resulted in a shortfall of RM 12,576,709.50 still due to our clients.
>
> ...
>
> ...
>
> Be that as it may in view of the above and pending the disposal of the Appeal we write to enquire *if you are agreeable to a stay of execution* of the order of 25.11.02.

[41] To be particularly noted here is the fact that this amount of RM30m positively asserted by the defendant's solicitors to be the 'proceeds of sale' in respect of the Kuo Shinn shares was voluntarily made and has never been sought to be corrected or amended by the defendant at any time up to the point of the hearing of this application in encl 25.

[42] To be also noted is the fact that the above representation which was made in writing by Messrs Gill & Tang in their letter of 12 December 2002 was *coupled with a request for a stay of execution pending disposal of the defendant's appeal to the Court of Appeal* against the order of court of 25 November 2002. The plaintiff acceded to this request for a stay of execution and I accept the submission that the plaintiff desisted from instituting any further proceedings or commence execution action against the defendant in reliance of defendant's admissions as aforesaid, namely that:

(a) the shares had been sold/disposed, and

(b) the proceeds derived was RM30m — a determined sum.

[43] After the defendant's application for leave to appeal to the Federal Court was refused (July 2009) and upon demand by the plaintiff for the RM30m (proceeds of sale), the defendant however changed track to state that the shares were now available to be delivered up.

[44] The defendant then attempted to tender to the plaintiff duplicate share certificates in respect of the eight million Kuo Shinn shares. The plaintiff, rightly in my finding, refused to accept the same as they were not in the first place delivered within the seven days ordered for such to be done in the order of 25 November 2002. Needless to say in the interim the value of the shares could well have diminished. The availability of the physical shares (in 2009) was contrary to what the defendant through their solicitors had expressly held out and had led the plaintiff to believe, namely, that the shares had been disposed of and a sum of RM30m had been derived therefrom by the defendant or constituted the proceeds of sale thereof.

[45] I hold the plaintiff was in the circumstances justified in not accepting any longer the physical shares regardless of what had transpired in the interim period for the defendant to be vested again with ownership of the shares. The defendant acknowledges that the Kuo Shinn shares were sold to one Highway Bricks Sdn Bhd. What appears to have transpired in respect of the 'sale' of those shares to Highway Bricks seem to be that the defendant was also the party who provided banking facility to that purchaser for purchase of those share for a value of RM30m. Apparently the said purchaser who had in turn pledged those shares to the defendant had defaulted on the loan and the eight million Kuo Shinn shares had subsequently reverted for the benefit of the defendant through a foreclosure. There is no doubt that here the legal interest in the shares had indeed passed hands when it was transferred to Highway Bricks. The shares had been 'transacted' and the defendant had divested of their interest in the shares at some stage. This is evident from one of the defendant's own affidavits, namely that of Moorthy Appalanaidu's affidavit — encl 27 exh A14 (affirmed on 21 March 2000) at para A8.4.

[46] There is no disputing the fact that the parties, and the defendant in particular, had conducted themselves on the basis that the shares had been sold. This is borne out even at the Court of Appeal stage, (see the grounds of decision — encl 24 exh A6 para 12) where this was the common premise between the parties.

[47] The defendant had consistently maintained that apart from the claim that they had a right in priority to the shares, that they had sold the Kuo Shin shares for RM30m. There was only one figure mentioned as proceeds of the sale all along by the defendant, namely, RM30m and none other.

[48] The irresistible conclusions that one can draw from all the facts adverted to above are that on or about the time of the order of court of 25 November 2002, the Kuo Shinn shares had (a) been sold, and (b) the proceeds of sale received by the defendant amounted to RM30m.

[49] The shares might have by the time of this encl 25 application reverted back for the benefit of the defendant but what has to be given paramount emphasis and consideration here is that the Kuo Shinn shares were not delivered up to the plaintiff within the deadline of seven day period ordered for that purpose in the order of 25 November 2002. The defendant's opportunity to deliver the Kuo Shinn shares to the plaintiff lapsed as of 2 December 2002. Following immediately to this default was the express admission made on behalf of the defendant on 12 December 2002 that the proceeds of sale received amounted to RM30m and on that ground the defendant then through their solicitors sought the plaintiff an agreement or consent to a stay of execution pending disposal of the defendant's appeal against the order of court of 25 November 2002.

[50] With those salient facts in the forefront in my mind, the issue before me was whether the *doctrine of the estoppel* argued for by the plaintiff to pin liability on the defendant for the sum of RM30m did come to the aid of the plaintiff. I held that the principles of estoppel as expounded by the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, did apply and did come to the assistance of the plaintiff in this fact scenario. I held that the defendant could not exculpate themselves from their representation that the shares had indeed been sold and the proceeds of sale received by the defendant in respect of the Kuo Shinn shares amount to RM30m.

[51] However before I discuss further the applicability of the doctrine of estoppel to the fact situation obtaining here in the case at hand, I need to address the contents of an affidavit filed late (on 13 May 2010) in the proceedings before me, namely encl 34, the affidavit of Mr PS Gill, counsel for

the defendant from the legal firm of Messrs Gill & Tang, who wrote the letters of 11 June 1999 and 12 December 2002 referred to above, the contents of which had admitted to both, the fact of the sale of the Kuo Shinn shares and the fact that the quantum of proceeds of sale derived was RM30m. If the intended thrust of the said affidavit (encl 34) was to explain away the incriminating admissions, I found the contents of the affidavit to be wholly evasive and vague. It adverted to the timing of him receiving certain information or instructions. The averments did not explain away, if at all, whether there had been any misapprehension or error on the part of this counsel as to the fact of the sale of shares and/or as to the quantum of proceeds received which had been expressly held out in the firm's said letters on behalf of the defendant. The affidavit did not explain or directly answer any such issue.

[52] In his own word, Mr PS Gill states that by the affidavit he was only making an 'attempt' to explain the representations made by him as counsel for the defendant at the material time. In para 3 he states:

> Saya membuat affidavit ini sebagai suatu percubaan ('attempt') untuk memberikan penjelasan mengenai tuduhan tuduhan yang di buat oleh Plaintif terhadap Defendan yang berkaitan dengan permohonan Plaintiff Kandungan 25 yang bertarikh 20.08.2009.

[53] He seemed not to be satisfied himself with the explanation proffered even if there was one at all, for the admissions that now stare in the face of and against the defendant.

[54] There is nothing in encl 34 for the court to conclude that the representation made on behalf of the defendant as to fact of the sale and the RM30m derived as proceeds of sales were not made on the instruction of the defendant. In encl 35 (also filed late) one Moorthy Applanaidu avers to the fact that Mr Gill had at all material times received instructions from him as the manager of the defendant. Further from encl 27 exh A14 it is clear that Mr Moorthy was at all material time the person responsible and the authorised representative of the defendant attending to this account.

[55] Now as to guiding principles expounded by the Federal Court in the *Boustead Trading*'s case on the operation of the doctrine of estoppel, it was clarified that it applied to both representations of fact and of law and it could be availed of in appropriate situation even if it was not expressly pleaded. It is a flexible principle by which justice is done according to the circumstances. All that a litigant who invokes the doctrine of estoppel must do is to show that he was so influenced by the encouragement or representation that it would be unconscionable for the representor to enforce his strict legal rights. The detriment element does not form part of the doctrine and all that need be

shown is that it would be unjust to permit the representor or encouragor to resile from the representation. It would be inequitable to do so.

[56] It is not essential for the plaintiff to show any longer that the plaintiff had suffered detriment for estoppel to apply in its favour. In any case the facts show that the plaintiff has definitely been prejudiced. The plaintiff had relied on the representation made by the defendant of the fact of sale and also of the fact of proceeds of sale being in the sum of RM30m and had withheld execution or further proceedings pending disposal of the defendant's appeal against the order of court of 25 November 2002.

[57] A 'mistake' per se by the defendant or their counsel, even it was so, is not a relevant factor for the doctorine of estoppel not to operate against the defendant. It is totally unconscionable for the defendant to now go back on their words and the representations made which the plaintiff had relied upon all this while.

[58] The inevitable conclusion on the evidence before this court, including contemporaneous documents referred to above, is that the plaintiff was definitely led to believe or to rely on the representations of the defendant that the Kuo Shinn shares had been sold and the proceed of sales obtained by the defendant amounted to RM30m.

[59] As of 12 December 2002 the plaintiff was entitled to receive the RM30m but had withheld any action to recover or enforce the same on the request of the defendant that such be delayed or stayed until after the defendant's appeal to the Court of Appeal was heard and disposed. The defendant was a commercial bank of some standing and it was in my finding not unreasonable at all for the plaintiff (on the basis of one bank to another bank) to grant this accommodation based on the assurance that the sum of RM30m was always there in cash terms when the appeal process was completed and should the judgment in favour of the plaintiff be affirmed. There was therefore no longer any issue of the defendant delivering up the eight million shares to the plaintiff, the time for which had expired on 2 December 2002. The plaintiff was justified in law and on the evidence to reject the defendant's attempt to do so only after a demand for the RM30m was made on behalf of the plaintiff.

[60] One further point that I need to address is this. Counsel for the defendant argued that I should hold from the circumstances surrounding this case that the plaintiff had waived the seven day time limit set down in the court order of 25 November 2002 for the Kuo Shinn shares to be delivered up to the plaintiff. There is no evidence of any aspect of the plaintiff's conduct or any other basis for such a conclusion to be drawn by the court. This is a bare

A statement by the defendant and devoid of any merit at all. In the light of the overwhelming evidence stacked against the defendant, such a contention on the part of the defendant is tantamount to an argument founded in desperation and seemingly one clutching on straws to avoid being held liable for their unequivocal admissions.

B

[61] On 25 November 2002 the defendant was ordered to deliver up the Kuo Shinn shares within seven days and no demand by the plaintiff was required to comply with that order. The defendant clearly failed to meet the deadline in that first part of the order of 25 November 2002.

C

[62] The defendant on 12 December 2002 represented that the proceeds received for the Kuo Shinn shares that had been sold was RM30m. This was a positive and unqualified representation made definitely on the instructions of the defendant. The plaintiff relied on this representation of the defendant right through to the conclusion of the defendant's appeal at the Court of Appeal. The plaintiff is not obliged to go through a process of assessment of damages in such circumstances.

D

E **[63]** I found that the plaintiff was therefore entitled by this application to get an order fixing the quantum of the proceeds of the sale for purposes of execution to be levied on the judgment (on liability) made by the court in the plaintiff's favour on 25 November 2002 and also to recover interest which the court had on 25 November 2002 allowed thereon.

F

[64] In respect of the rate and the period for which interest had been in principle awarded to the plaintiff, the plaintiff in encl 25 had applied for interest to be awarded at the rate of 8%pa, the rate of interest allowed on judgment sums. There was no serious dispute raised by the defendant to the G said rate. In so far as to the period for which interest was to be ordered, I held that in all fairness the commencement of such period should be the expiry of the seven day period within which under the order of court of 25 November 2002 the defendant had to physically deliver up the Kuo Shinn shares, ie 2 December 2002. This did not take place and entitlement of the defendant to H proceeds of sale from the shares (admitted subsequently as RM30m) became operative as of that date. I accordingly so ordered.

Plaintiffs' application allowed with costs.

I

Reported by Ashgar Ali Ali Mohamed